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SUPREME COURT, U.S.

NO. 97-2044

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

HAGGAR APPAREL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

A BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE

Counsel certifies that the full name of the party represented by our firm is Haggar Clothing Co., formally known as Haggar Apparel Co. The parent company, which has issued shares to the public is Haggar Corp. No other subsidiaries or affiliates have issued shares to the public. There are no nonwholly owned subsidiaries.

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STATEMENT

This case involves a claim for a partial duty exemption on certain imported trousers assembled in Mexico from components produced in the United States. The dispute centers on whether the placing of a pair of pants in a relatively hot oven, which processes 800 garments per hour at a cost of approximately 1 cent per garment, can be considered a process "incidental" to the assembly of those pants within the meaning of item 9802.00.80, Harmonized Tariff Schedules of the United States, (HTSUS). [1] If the process is "incidental," then the value of the U.S. fabric components subjected to that process would not be subject to duty upon importation of the finished product into the United States

This case involves nothing more than a technical dispute over the application of the Tariff laws, a decision best left to the expertise of the specialized courts created by the Congress to resolve these matters. The courts below found for Haggar based upon the application of a standard analysis, "Mast factors,"[2] a balancing test uniformly applied by the courts and the administrative agency for 17 years. Not only does the Customs Service, itself, use this approach, but it endorsed the test in arguments presented to this Court

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[1] Formally item 807.00, Tariff Schedules of the United States, see Pet. Note 1, at 5.

[2] This term is derived from the holding in *United States v. Mast*, 668 F.2d 501, (C.C.P.A., 1981) a case which synthesized the approach to the application of the relevant statutory provisions following their amendment in 1965.

in 1996 when Chrysler asked this court to overturn the application of those factors to its importations. The government responded:

> Petitioner (Chrysler) is wrong to fault the courts below for interpreting the Service's Regulation in light of the correct construction of the statute that the Court of Appeals adopted.

Brief for the United States in Opposition, *Chrysler Corp. v. United States*, No. 95-2058, at 9.

The government seeks reversal of the lower courts' decisions by urging they failed to give "controlling weight" deference to a regulation interpreting the tariff provision. That regulation sought to add an additional condition on the duty allowance (*i.e.*, whether the process improves the condition of the component) which the courts below found to violate the plain language of the statute. Regulations which violate the statute are accorded no deference by the courts. Thus, the question which so consumes the government's petition here, is neither material nor relevant to this case or the decisions below.

This case is substantially different than the cases which raised "deference" issues of concern to the government. This case involves a regulation held *ultra vires*. The government cites no other comments or holdings on the proper level of deference to its regulations with which it is dissatisfied. All the other cases with which it is dissatisfied, deal with the proper standard of review of either *ad hoc* actions taken by Customs officials at various ports of entry around the country, or private letter rulings issued to an individual importer. Those questions should be addressed on their own merits and in a proper case.

In any event, the Government's claim for a "controlling weight" deference standard to its decisions in tariff classification cases is not based upon a fair representation of the rationale used by the lower courts. They did not reject the government's claim based solely upon the directive to "reach the correct decision," and the standard applied does not constitute a departure (radical or otherwise) from the principles of law which govern customs classification cases. (Pet. At 10). The lower courts have applied the standards established for this specialized area of federal jurisprudence – 28 U.S.C. 2638, 2639(a)(1), 2640(a)(1), 2642, and 2643(b). The government's argument ignores a host of considerations including the leading judicial expression of this standard, *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984) – a case cited at least 326 times without any negative references. Moreover, the suggestion that the Congress would have established specialized trial and appellate courts to review this area of law, but that those courts should defer to the agency under standard administrative law principles defies logic and common sense, as well as the governing statutes.

BACKGROUND

1. The statutory provision at issue finds its roots in court decisions, followed by numerous Customs rulings, which held that American products which were merely attached or assembled with foreign parts could be allowed duty free entry into the United States as American goods returned without having been advanced in value or improved in condition. *See*: Paragraph 1615(a), Tariff Act of 1930; *C.J. Tower & Sons v. United States*, 33 Cust. Ct. 14, (C.D. 1628, 1954): and *Denike v. United States*, 5 Ct. Cust. Appls. 364, (T.D. 34553, 1914).

The adoption of item 807.00, Tariff Schedules of the United States, (TSUS), in 1963 was an effort to codify the substance of this well established practice under a different theory. Tariff Classification Study, Explanatory and Background Materials: Schedule 8 -- Special Classification Provisions, Appendix to the Tariff Schedules, Nov. 15, 1960, pp. 13-16. However, since the substance of the practice was carried over, to qualify under this provision a U.S. component could not be "advanced in value or improved in condition" except by the acts of assembly.

In 1965 the Congress amended this provision to enlarge "the class of activities which may be performed abroad without subjecting the U.S. product to duty." S. Rep. No. 530, 89th Cong.,1st Sess. 34 (1965). Specifically, Congress decided to allow the component to be "advanced in value or improved in condition" by nonassembly processes so long as the nonassembly process was "incidental" and it listed the three examples of cleaning, lubricating and painting. The Congress acknowledged the amendment:

> Would specifically permit the U.S. component to be advanced or improved.... Such operations, if of a minor nature incidental to the assembly process, whether done before, during or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad. H.R. Rep. No. 342, 89th Cong., 1st Sess. 48-49 (1965).

2. With respect to the regulatory provisions at issue here, they list operations Customs might find both as incidental and nonincidental. *See*: 19 CFR 10.16 (b) and (c). Both subsections (b) and (c) describe the lists of operations as "examples." A characterization also used in the notices which promulgated the regulations. 39 FR 24651, July 5, 1974; and 40 FR 43021, Sept. 18, 1975. Consistent with the

express terms of the regulation, the practice has been to view these examples, both statutory and regulatory, as just that – examples; which still require an analysis of the specific process to determine whether that process was incidental or significant. *See*: *General Motors v. United States*, 976 F.2d 716 (Fed Cir. 1992) (the statutory example of painting); and United States Opposition to Petition for a Writ of Certiorari, *Chrysler Corporation v. United States*, No.95-2058, (regulatory example of preservative painting). Indeed, the government has allowed chemical treatments which impart new characteristics, *see* Customs Ruling HQ 556836, Dec. 2, 1992 (App. at 5a-8a) (adding acid to a battery cell and charging it for 88-96 hours).

3. In relation to this case, the government's statement of the facts is confusing and self-serving. The government neglected to mention that three different models of "Presstige" pants were assembled at the same facility, all of which met the same performance characteristics and were imported. Only the model 245 pants here at issue were denied treatment under statutory provision at issue. T.C. Op., Pet. App. 8a-9a.[3]

Haggar achieves these performance requirements using three different types of fabric -- that is "pre-cured," "post-cured," or purely synthetic. Curing involves the application of heat to fabric treated with resin. Under the "pre-cured" approach heat is applied to the resin-treated fabric at the textile mill in the United States; Haggar purchases the fabric, cuts it to shape, assembles the components, and presses the completed garment. Under the post-cured approach, Haggar purchases resin-treated fabric from the mill, cuts, assembles, and presses the garment, and bakes it in a curing oven. Both the pre-cured and post-cured

[3] For ease of reference, page citations to the opinions below will reference their location in the Appendix to the Petition.

methods use fabric of a cotton-synthetic blend. Presstige pants made from a pure synthetic fabric require pressing, but do not require resin treatment or baking.

The garments at issue – Model 245 pants imported by Haggar in 1988 and 1989 – were made from fabric which was post-cured. The fabric and other components, such as buttons, thread, zippers, and trim items, were manufactured in the United States. Haggar cut the resin-treated fabric to shape, and exported the fabric and remaining components to Mexico, where they were assembled into pants by Haggar's wholly-owned subsidiary. Following assembly, pressing, and baking, Haggar assembled hangtags and tickets to the pants and packaged and shipped them to the United States. The hangtags and tickets must be attached after pressing (and ovenbaking) since heat could potentially damage the paper labels. Trial Transcript (T.T.) 198-199.

The same assembly and pressing process is used for all Presstige pants -- without regard to which methods are used to achieve the performance requirements, *i.e.*, "pre-cured" fabric, synthetic fabric or "post-cured" fabric (*i.e.*, ovenbaked fabric). Each assembly involves over 50 individual labor intensive steps, exclusive of ticketing, labeling and packing. The engineering standards for all three models were the same and the same sewing specification manual is used. [Stip. Facts 56,58] The only difference in the assembly of the ovenbaked product occurs after pressing. In the post-cured method, the pants are loaded on an oven conveyer, baked, and then unloaded from the conveyer.

The stipulated facts indicate that the incremental cost of this process was only $.0106 per garment, approximately .3% of the cost of the components or 2% of the assembler's operating costs. The stipulated facts also reflect that while an individual pair of pants remained in the oven for 12-15 minutes, the oven processed 800 garments per hour –

effectively less than 5 seconds per garment, significantly less than 1% of the time for the assembly operation. Evidence at trial (T.T. 87) also reflected that the same effect could have been achieved by allowing the garment to remain in the pressing unit for an additional 2 to 3 minutes, an approach that would have added approximately 8% to total operation time at an incremental cost of 1.4% of the cost of the components. It was these minor (incidental) differences that led the government to deny the duty benefits to the fabric components at issue here, while granting them for the other two models not subject to the ovenbake process.

4. As with its description of the facts, the government's characterization of the decisions below is both incomplete and misleading. Initially, the government's assertion that the courts below "declined in this case to consider the applicable Customs Service regulation" or "ignored" the regulation, is simply not accurate. Application for an Extension to File a Petition, 2, and Petition, 9.

The trial court examined in general terms whether the degree of advancement in value (improvement) was an appropriate consideration under statutory language. The court found those arguments to be "meritless," concluding the statute "does not prohibit an advancement in value … so long as the operation in question is incidental to assembly." T.C. Op., Pet. App. 22a. The trial court then looked to the language of the opening paragraph of 19 CFR 10.16 and concluded that language "conflicts with the plain language of item 807.00" T.C. Op., Pet. App. 23a. It then looked to the language of 10.16(c)(4) and noted that:

> Item 807.00 does not prohibit operations which merely impart new characteristics to the article being assembled as the regulation provides, but in fact permits a duty allowance for such improvements to

> such articles so long as the operation imparting those characteristics was incidental to assembly.

T.C. Op. Pet. App. 23a. This finding was specifically upheld by the appellate court which concluded:

> The court looked to the express language of the statute and correctly concluded that the statute does not prohibit advancement in value where the operation in question is incidental to the assembly process.

App. Ct. Op. Pet. App. 3a. In short, the courts below did not "ignore" the regulation, rather they held the regulation, and the considerations upon which it is based, contrary to the plain language of the statute.

The government likewise did not provide a complete description of the trial court's findings on the incidental nature of the process at issue which were based upon the considerations outlined in *United States v. Mast Industries, Inc.*, 668 F.2d 501, 506 (C.C.P.A., 1981). The court looked first to the costs, T.C. Op., Pet. App. 17a, and found they represented only 1.7% of the cost of the components and only 10.6% of the cost of the assembly operation, well within the norms historically used by Customs and the courts to find an operation incidental. Even these percentages were only reached by combining the pressing operation (which Customs allowed for other models) with the ovenbake process. Although the court conceded that "in a strict sense, pressing is not part of curing," it did, over Haggar's objections, find the processes sufficiently related to justify this approach. T.C. Op., Pet. App. 16a.

The trial court did not find Pet. 8, that time considerations weighed against the duty allowance. The trial court found that since this was an automated operation the

time was not relevant,[4] citing *General Motors v. United States*, 976 F2d. 716, 720 (Fed. Cir. 1992). This was a rational approach since, while an individual pair of pants remains in the oven for 12-15 minutes, the oven processes 800 garments per hour, effectively 5 seconds per garment. The record also reflects the operation could have been performed manually in only 2-3 minutes. The government has never suggested that Haggar should be disadvantaged for adopting a more efficient approach.

The trial court did not "agree with the agency," Pet. 8, that ovenbaking was unnecessary for assembly -- Haggar never suggested that it was. No post-assembly operation can be considered "necessary" for an act which is already complete, and as the court noted, the legislative history specifically indicates that "incidental" operations can be performed after assembly is complete. T.C. Op., Pet. App. 20a. Thus, and more to the point, the court never suggested this fact weighed against the duty allowance; it is simply an irrelevant consideration for post-assembly operations.

While the trial court did find that capital investment costs weighed against the duty allowance, T.C. Op., Pet. App. 18a, the government neglects to mention that, depending on whether one used depreciated value or replacement cost, either 82% or 100% of that capital investment related to pressing equipment used equally on the other models of pants for which the duty allowance was granted. This, in light of the question on the propriety of combining the pressing and curing operations in the first instance, led the court to accord this factor very little weight.

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[4] The Customs Service applies this same approach administratively. *See* H.Q. 556836, App. 5a-8a. Finding an 88-96 hour operation incidental.

The trial court also found that strong economic and practical considerations dictated that the ovenbake operation occur at the site of assembly. That finding, coupled with the insignificant cost of the operation, and the absence of any strong factors to the contrary, led the court to find the process was "incidental." T.C. Op., Pet. App. 21a.

Finally, after concluding both that the process at issue squarely fell within the parameters of the test long applied by both the courts and the Customs Service, and that the particular regulation at issue was contrary to the plain meaning of the statute, the courts below addressed the question of deference. The discussion by the trial court reached no conclusion and it is clear that neither court viewed this discussion as determinative for its holding. Deference is never accorded a position contrary to the express language of a statute. Thus, the language of these decisions which has consumed almost the entirety of the government's attention in its submissions to this Court is merely *dicta*.

REASONS FOR DENYING THE PETITION

The order of the issues presented, and the entire thrust of the government's petition, places the "cart before the horse." The degree of deference to be accorded decisions or regulations of the Customs Service is not relevant when that regulation and/or its application is contrary to the plain meaning of the statute. "(T)hat is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). The substantive findings of the courts below are not extraordinary, but are consistent with the statute and the approach long followed by the courts and the agency. While the petition chides the trial court for

interpreting the application of the regulation on the basis of *United States v. Mast Industries*, 668 F.2d 1653 (Fed. Cir. 1981), and *General Motors, Inc. v. United States*, 976 F.2d 716 (Fed. Cir. 1992),[5] Pet. 7-8 – just two years ago the government told this Court that the *Mast* analysis applied by the Federal Circuit in *General Motors* constituted the "correct construction of the statute" Brief for the United States in Opposition, *Chrysler Corp. v. United States*, No. 95-2058., at 9. Thus, the first question to be addressed is whether the government's change of heart on the correct construction of the statute is justified.

I. THIS CASE INVOLVES ONLY A TECHNICAL DISPUTE OVER THE PROPER APPLICATION OF THE TARIFF LAWS

Item 9802.00.80, HTSUS, sets forth three criteria for its applicability. First, the exported component must be ready for assembly "without further fabrication." Thus, after export to the foreign country, if an operation is performed on that component that has the effect of further fabricating the component to make it ready for assembly, the condition is breached. The focus of this condition is not on whether the process was minor or significant, but rather the focus is on the effect of that process on the component. *See: Samonsite Corporation v. United States*, 889 F.2d 1074 (Fed. Cir. 1989).

The second criteria is that the component cannot have lost its physical identity by change in form, shape, or otherwise. Again, the focus is not on the process, but rather on the effect of the process on the component. *E. Dillingham, Inc. v. United States*, 470 F.2d 629, 635 (C.C.P.A., 1972).

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[5] This decision specifically applied the *Mast* factors, *id.* 719-21.

The third criteria, at issue here, deals with improvements to the components by nonassembly operations. As noted above, when item 807.00, TSUS (predecessor provision for 9802.00.80, HTSUS) was initially enacted in 1963, if a component was "advanced in value or improved in condition" by a non-assembly operation the criteria was breached. In 1965 the Congress decided to "enlarge the class of activities which may be performed," S. Rep. 530, 89th Cong.1st Sess. 34 (1965), by allowing nonassembly operations to advance or improve the component, so long as the operation which created that improvement was "incidental" to the assembly process. The statutory language is plain that the component can be advanced or improved. A reading that is directly confirmed by the legislative history. *Supra* at 4. It places no limit on the degree of that improvement, so long as the process which creates that improvement is incidental to the assembly process. Here, then, the focus is not on the component, but rather on the process: Is the process "incidental"?

The government's attempts to make the degree of improvement a factor were rejected more than 20 years ago in *Rudolph Miles v. United States*, 567 F.2d 979, (C.C.P.A. 1978). Contrasting the statute as amended in 1965 with prior provisions the court concluded:

> Item 807.00 logically assumes that there has been an advancement or improvement, but limits the extent of the advancement in value or improvement in condition to that which is brought about solely by the act of assembly or operations incidental thereto. Hence, appellant here does not have the burden of showing that there was no advance in value of the (assembled components).

Id. 983. Three years later, the government attempted to rephrase its argument, objecting that the "operations created features in the garments which had a utility independent from the assembly process." *Mast*, 668 F.2d at 506. The court examined the statute and its legislative history and found no support for such a position concluding the intent "was not to preclude operations that provided an 'independent utility' or that are not essential to the assembly process," rather the pertinent question was "to ascertain whether an operation of a 'minor nature' is incidental to the assembly process." *Id.*. The court reached a similar conclusion in *United States v. Oxford Industries, Inc.*, 668 F.2d 507, 511 (C.C.P.A. 1981), noting "neither 807.00, TSUS, nor its legislative history suggest such a test...."

By seeking to put a limit on the degree of permissible improvement, or by indicating that there are certain types of improvement which are prohibited, the government is seeking to impose a condition on the duty allowance that was not imposed by the Congress. This they may not do. This question was squarely decided by this Court over 100 years ago in *Morrill v. Jones*, 106 U.S. 466 (1882). The Congress had provided for duty free entry of animals imported for breeding purposes "upon proof thereof satisfactory to the Secretary of Treasury, and under such regulations as he may prescribe." The implementing regulations sought to limit this treatment to animals "of superior stock, adapted to improving the breed in the United States," *i.e.*, there were certain types of animals the government sought to exclude. The response of this Court was short, succinct, and very clear:

> The Secretary of the Treasury cannot by his regulation alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by

> the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe... That is not the office of a Treasury regulation.

Id. at 467. Just as the government could not make the potential degree of improvement to the breed a factor in 1882, it cannot today make the degree of improvement a factor as to whether a process was incidental to assembly.

It is important to note that the government's arguments here, that the regulation can be applied consistent with the plain meaning of the statute (Pet. 19-20), represent a shift in its litigation strategy. Four months after the government filed its sur-reply to Haggar's reply to the government's post trial brief, the trial court asked both parties to comment on the potential application of the regulation. The government responded: "We did not brief the regulatory issue, even though we feel the regulation is valid, mandatory and consistent with statute. This was a judgmental decision to avoid diminishing the consideration of the *Mast* arguments...." While the letter proceeds to argue in general terms for "controlling weight" deference, the sole justification for consistency with the statute was a footnote which indicated:

> Processes in issue may preclude 9802 treatment if they advance the components in value or improve them in condition. This means that even if there is no or minor advancement in value, if there is significant improvement in condition that is not incidental to assembly, the components cannot be accorded 9802 treatment.

Department of Justice, Letter to Judge DiCarlo, January 26, 1996, at 2. This position is simply untenable under *Morrill*.

In its instant petition the government ignores that the condition it wishes to impose is not one the Congress thought necessary to prescribe and advances several arguments not raised previously in an attempt to make its position appear more palatable. Pet. 20-21. The government first tries to draw a distinction between "improvement of a component" and "to impart new characteristics" to a component. Despite the attempts at word games, whether it is phrased as impart "new characteristics," "independent utility," "improvement of a component" or "advancement in value" – the issue remains the same. For example, painting, a statutorily permissible example, is obviously intended to improve a component and to impart the new characteristic of either rust prevention or a decorative appearance. The statute was amended to allow a component to be advanced or improved and places no limit on either the type or degree of that improvement. It is disingenuous for the government to suggest that the courts have failed to find a "flaw" in the attempt to make this an issue. Pet. at 20. As noted above, the courts have consistently, and in this litigation specifically, found that attempt to be contrary to the plain language of the statute.

The government then seeks to rely on the concept that the operations at issue are "not necessary or related to assembly." Again, this is not the statutory test. Congress could have used the phrase "by operations necessary or related to assembly." It did not. "Incidental" is a much broader term that was designed to "enlarge" the scope of permitted activities. "It is difficult to visualize a situation where the sole purpose of painting would be to facilitate assembly, or even where painting would be essential to the assembly process." *Mast*, 668 F.2d at 505. Moreover, the

ovenbake process needs to be accomplished prior to the attachment of the hang-tags and tickets, and the trial court found, as a matter of fact, that strong economic and practical considerations dictated this process be done at the site of assembly prior to shipment to the customer. Thus, it is related to the assembly process of the completed good to be shipped to the customer.

The government also seeks to rely on the reference to "chemical treatment." Yet as the government, itself, described the facts to the Court of Appeals:

> Pre-cut fabric components were shipped to Mexico from the United States, after they had been chemically treated in the United States. In Mexico, the components were assembled into pants. After completion into pants, they were pressed and subjected to an ovenbaking process which gave the pants a permanent press feature.

Brief for Appellant, at 2. The components simply were not "chemically treated" in Mexico. Even if the government were to now argue the opposite, that argument does not alter the extent of the operation at issue. The government can no more arbitrarily exclude a minor process it does not like, then it can arbitrarily seek to exclude certain breeding stock it does not like. *See Morrill v. Jones*, 106 U.S. 466 (1882).

It is instructive that the government ignores the opening phrase of the regulation at issue, "any significant process." This phrase is critical since it focuses attention on the process and not its effect. In prior litigation, and administrative rulings, the courts and the government have recognized that this consideration is crucial to application of the examples in a manner consistent with the language of the statute. The *General Motors* case dealt with the painting of components. Plaintiff was of the view this operation was

permissible since painting was listed as an allowable operation by the statute. The government disagreed arguing that the process was significant (primarily based upon its cost). The Court of Appeals agreed describing the reference to painting in the statute as an "exemplar" and that the process needed to be viewed in "an objective way to determine if particular operations are minor and incidental to assembly." *General Motors*, 720 F.2d 719-720. It is incredible for the government to suggest, as it has here, that the examples in its regulations should not be subject to the same analysis it applies to the examples in the statute. The government should not be permitted to argue that "no means no, but yes means maybe."

In fact, in other cases, the government has argued that its regulatory examples should be subject to this same analysis. In *Chrysler*, the plaintiff argued that its painting operation was primarily preservative and therefore should be covered by 19 CFR 10.16(b). The government argued to this Court that the examples in its regulations were just that -- examples, and that to be consistent with the statute one needed to examine the operation itself to determine if it was significant. Brief in Opposition, *Chrysler Corporation v. United States*, No. 95-2058, at 9.[6] It is beyond dispute that the Customs Regulations must be read in light of, and applied consistent with, the plain meaning of the statute.

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[6] The agency has applied the same analysis. *See, e.g.*, H.Q. 556362, App. at 9a-13a, which dealt with a painting operation described as primarily preservative, although it utilized a variety of colors to meet customer specifications. Customs still looked to the significance of the operation and found it minor in order to grant the duty allowable. It should be noted that the costs of operation ($.086 paint plus $.01302 labor) was 16.5% of the cost of the components ($.485 and .115). In the instant case the cost of the operation at issue is less than 2% of the cost of the components.

The only factor which even arguably weighs against Haggar is the capital investment amount, which is composed entirely, or almost entirely, of the pressing equipment used equally on pants for which the duty allowance has always been allowed. It is obvious that pressing is no more related to assembly then the ovenbake process. The government's arguments are no more then post-litigation rationalization designed to obscure the simple truth the only reason the duty allowance was denied was that the effect of this operation is one the government decided arbitrarily to prohibit. That finding is contrary to the plain meaning of the statute and this Court's holding in *Morrill v. Jones*.

It is interesting the government concludes its petition with the assertion that insistence of the courts below to examine Customs regulations in light of the *Mast* and *General Motors* factors is "inherently subjective," the factors to be considered may "vary from situation to situation" and thus leaves the trade community without "effective guidance." Pet. 24. *Chrysler* also alleged "the sky was falling." The government's response in Chrysler is as applicable today as it was two years ago.

> Nor is petitioner correct in asserting that, by requiring that painting processes be "minor," the court of appeals created a "highly subjective" requirement out of whole cloth, or that it has opened the door to "additional and possibly unknown conditions." As we have explained, the court's view is fully supported by the ordinary meaning of the word "incidental," which is the central criterion in the pertinent statutory language.

Brief In Opposition, *Chrysler Corporation v. United States*, No. 95-2058, note 2 at 6.

It is the statute which mandates an examination of the significance of the process. If the government believes that all permapressing or all painting, regardless of the significance of the operation, should be allowed or disallowed, their dispute should be taken to Congress and not the courts. It is patently obvious the operation at issue is incidental, and "occurs as 'a minor concomitant' of the assembly process." Pet. 18-19. It is minor from every perspective. It is subordinate to the assembly process and naturally occurs at the site of assembly.

Certainly, the factual circumstances to be considered when one is building a vehicle may vary significantly from those involved in assembling a pair of cotton trousers. That does not change the fact that the substantive decision of the courts below is consistent with the express language of the statute and the approach long followed by the courts and the Customs Service. It is an approach well understood and relied upon by the trade community and the government, and has resulted in very few disputes. The disputes have been, as here where the government has sought to question the degree of improvement, as opposed to the significance of the operation which created that improvement. These well settled expectations should not be disturbed.

It is widely acknowledged that Congress established the courts below as specialized tribunals, with unique expertise, to insure uniform national application of the tariff laws.[7] Those courts have consistently and uniformly held

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[7] Hearings before the Subcommittee On Monopolies and Commercial Law of the Committee On the Judiciary, on the Customs Courts Act of 1980, H.R. 6394, February 13 and 28, 1980. Statement of Congressman Seiberling, "Act will create a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise ... to assure a national consistency..." *Id.* At 1; testimony of Senator Dennis DeConcini, "The U.S. Court of International Trade would continue to be equipped with the same expertise and specialized

that the degree or type of improvement, caused by a process which is otherwise incidental to assembly, is an impermissible consideration under the relevant statutory language. The government has presented no reason to question that judgment.

II. THE GOVERNMENT HAS IMPROPERLY ASKED THE COURT TO REVIEW *DICTA*

The Opinion and Judgment Order of the trial court consumes 18 pages of Petitioner's appendix, only the penultimate paragraph of which addresses the question of deference. While that paragraph acknowledges the government raised the deference to a regulation issue, it does not decide the question. The trial court merely noted that this assertion might have been put into question. T.C. Op., Pet. App. At 23a. The judgment of the trial court thus rests on its findings that the process was incidental and the attempt to interject a consideration of the degree of improvement created by that process was contrary to the plain meaning of the statute. Not only was the question of deference unnecessary and irrelevant to the judgment of the trial court, it did not even express an opinion on the subject. It is a stretch to even consider this language dictum.

The appellate court specifically upheld the findings of the trial court on the incidental nature of the process and its finding that the attempt to interject a consideration of the degree of advancement that process created was contrary to

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skills ... to insure uniformity of decision and policy to litigants with regard to the adjudication of disputes involving import transactions." *Id.* at 3; statement of Honorable Edward D. Re, Chief Judge, United States Customs Court, *Id.* at 22; statement of David M. Cohen, Director, Commercial Litigation Division, Department of Justice, "The bill will take advantage of the expertise of the Customs Court and will ensure uniformity in the important area of international trade." *Id.* at 53.

the express language of the statute. While the appellate court did express a stronger opinion on the deference question, it concluded "The decision of the Court of International Trade was correct for the reasons stated in its opinion." App. Op., Pet. App. 4a. It is thus clear that the comments of the appellate court on the deference question were neither necessary nor essential to its determination to uphold the judgment of the trial court. These comments, therefore, should be viewed as no more then *dicta*.

The government, Pet. at 23, notes the comments on deference in the instant matter are contrary to those in *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995). The government fails to note that in *Goodman*, the court, as here, found the Customs interpretation to be impermissible in light of the statutory language. It is not appropriate to ask this Court to resolve an apparent conflict between *dicta* in two separate panel opinions.

The government's string citation of recent Federal Circuit opinions, Pet. 22, likewise provides no reason to review the instant matter. The government neglects to mention that none of these cases dealt with a regulation. Classification disputes reviewed by the courts below may be based upon an *ad hoc* decision of a local Customs port official, a private letter ruling (19 CFR 177.9(b)(2)), a ruling published in the Customs Bulletin or Federal Register (19 CFR 177.10(b)), or as here, a regulation. There is certainly no reason to assume that the level of deference to be applied to these divergent situations would be uniform. *See*, for example, *Bankers Life and Casualty Company v. United States*, 1998 U.S. App. Lexis 7631 (7th Cir. 1998), description of the "free-fire zone of judicial debate" over the level of deference to be accorded to various types of interpretations by the Internal Revenue Service. Other than the *dicta* here, the government points to no other comments

or holdings of the court below dealing with the proper level of deference to a regulation with which it is dissatisfied.

It is wrong for the government to suggest, Pet. at 22, that because its request for a rehearing *en banc* was rejected further consideration below is precluded. The government's petition for a rehearing neither mentioned nor sought reconsideration of the dispositive holding by both the trial court and the appellate panel that the regulation was contrary to the plain language of the statute. The Federal Circuit is clear that where the standard of review is irrelevant to the determination, consideration of this issue would be premature and place an unnecessary burden on the respondent. *In Re Andreas G. Kemps*, 97 F.3d 1427, 1431 (Fed. Cir. 1996). Thus, rejection of the rehearing request should not be read to preclude further review of the *dicta* (or apparent conflict between panels) by the full court below.

The Congress created specialized courts with unique expertise and national jurisdiction to ensure consistent and uniform application of the Customs laws. *Supra*: Note 7 at 19. Judicial prudence suggests that those courts should be provided the opportunity to consider these issues in a case where resolution is material to the outcome and the competing considerations are fully briefed by the parties.[8] That is not the situation here. As noted *supra* at 14, the government did not even raise the issue of deference to its

[8] Interestingly, the government generally supports this approach. In the *Universal Electronics* case, 112 Fed. 488 (Fed. Cir. 1997) case, the government noted "Initially, we agree that the 'special deference' as applied by *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, may not be applicable here, but not for the reasons *Universal* expouses ... because the proper application of deference is an important issue, it is advisable to leave its applicability to an appeal where the issue must be decided, based upon factors and a record that permit the resolution of the real controversy." Brief for Appellee, *Universal Electronics Inc.* v. United States, C.A.F.C. 96-1345, note 12 at 33, 34.

regulation at trial, preferring to rest on its arguments on the "Mast" factors. The government's arguments to the appellate court, as here, discuss the deference question in the most generalized terms. The government has made little or no attempt to relate those arguments to the specific statutory provisions and court decisions applicable to tariff classification disputes.

III. THE GOVERNMENT DOES NOT FAIRLY PRESENT THE RATIONALE UNDER WHICH THE COURTS (IN CASES PROPERLY RAISING THAT ISSUE) HAVE REJECTED THE DEFERENCE STANDARD IN TARIFF CLASSIFICATION CASES

The government's suggestion that the Congressional Directive to reach the "correct decision" reflects the sole basis for the courts comments on deference is simply not accurate. For example, at oral argument Judge Clevenger chided the government for its failure to even mention, much less discuss, this Court's opinion in *Morrill v. Jones*. He noted it not only addressed the question of the ability of a regulation to alter the scope of a tariff heading, but had been cited with approval by every circuit court. No mention of this directly relevant precedent is found in the rehearing request or in the instant petition.

While the government seeks to describe the views of the courts below as a recent radical departure made without plausible explanation, they can do so only by ignoring *Jarvis Clark Co. v. United States*, 733 F.2d 873 (Fed. Cir. 1984). This case was decided shortly after the current court review provisions were enacted, and it has been cited at least 326 times without any negative references. In that case, as here, Pet. at 15, the government argued that 28 U.S.C. 2643(b), was concerned only with procedural remedies, *i.e.*, it was no more then a grant of general equity powers. The court

squarely rejected that argument based upon the historical context, which led to the passage of 28 U.S.C. 2643(b), and the desire of the Congress to eliminate a "dual burden of proof" standard. *Id.*. 876-78. Yet the government neglects to mention this decision or discuss the rationale upon which it was based.[9]

The government likewise fails to mention, much less discuss in context, the series of provisions enacted by the Congress to govern judicial review in this area of the law. 28 U.S.C. 2638, 2639(a)(1), 2640(a)(1), and 2643(b). As such its assertion, Pet. At 13, that the sole basis for the views of the courts below is the directive to "reach the correct decision," 28 U.S.C. 2643(b), represents a gross distortion. Where a regulation has not been at issue, the courts below have looked to section 2638 and concluded:

> This provision is incompatible with the notion that special deference should be given to the agency's construction of the tariff schedules; otherwise, the court's review would have to be limited to those legal grounds raised before the agency.

Anval Nyby Powder AB v. United States, 927 F. Supp. 463, 468, n. 15 (CIT 1996). 28 U.S.C. 2639 is also directly relevant since it provides that the "decision of the Secretary is presumed correct." On its face this provision appears to provide a standard of review the Congress deemed appropriate in these situations, yet the government, both here and below, neglects to even mention this provision or discuss its relevance. The government likewise ignores 28 U.S.C.

[9] The government also argues the direction to "reach the correct decision" does not distinguish the Court of International Trade from all other courts that have the same responsibility, yet they point to no similar direction in any other statute. Other than its own disbelief, the government points to no reason that Congress did not mean exactly what it said.

2640(a)(1), which requires the courts to review these matters *de novo*. Finally, the government ignores that it is the reading of all of these provisions in together and in context that has led the courts below to their views. *Iko Industries, Ltd. v. United States*, 105 F.3d 624, 626 (Fed. Cir. 1997).[10]

This reading of the Title 28 provisions is consistent with the underlying intent of the Customs Courts Act of 1980, namely consistent uniform national application of the tariff laws. The House Report cites with approval the following comments of Chief Judge Re, who noted that the proposed legislation:

> Will implement the constitutional mandate, which provides that "all duties, imports(sic), and excises shall be uniform throughout the United States," by utilizing the national jurisdiction of the Customs Court to provide uniform and consistent interpretation and application of the laws involved in disputes arising out of import transactions.

H.R. Rep. No. 96-1235, 96th Cong., 2d. Sess. 29 (1980). These sentiments were echoed by the Chairman of the House Judiciary Committee when the bill was brought to the floor. Chairman Rodino indicated the legislation was designed to create a comprehensive system of judicial review:

[10] These provisions are also consistent with a long line of court decisions, of which the Congress would be deemed aware, that any doubt in the construction of tariff terms should be resolved in favor of the importer. *Hartcraft v. Wiseman*, 121 U.S. 609, 616 (1887); *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 474 (1891); *Benziger v. United States*, 192 U.S. 38, 54 (1904); *Gorton's of Gloucester, Inc. v. United States*, 52 C.C.P.A. 86, 88 (1965); *Pistorino & Company v. United States*, 82 Cust. Ct. 168, 179-80 (1979).

> Utilizing the specialized expertise of the U.S. Customs Court and the Court of Customs and Patent Appeals to insure a national uniformity in the judicial decisionmaking process ... for import transactions as required under Article I, Section 8 of the Constitution.

Congressional Record 96th Congress, Second Session, H 9342-44 (Sept. 22, 1980). The failure of the government to discuss this concept, either here or below, is crucial when one considers the implications of the "deference" which is sought. By its very terms deference implies a range of permissible choices, *i.e.*, there can be two or more "reasonable applications of the statute." Pet. at 19. Thus, if the port of New York classified a particular garment as "loungewear" and the port of Miami classified the garment as "sleepwear" – so long as both ports had a "reasonable basis" for their decisions, the court would be required to uphold both classifications. Such a result would be contrary to the premise of national uniformity upon which these court review provisions were based.

At the time the Customs Courts Act of 1980 was enacted, the Congress also must have had in mind the legal notes governing tariff classifications. The government in its petition cites frequently to General Headnote 11, Tariff Schedules of the United States[11] as the basis for its argument that the regulation at issue was statutorily authorized. In Haggar's view, that provision, on its face, only conditions a claim for duty relief on compliance with such regulations when "the facts are not determinable from an examination of the article itself in its condition as imported." This provision concerns procedural and burden of proof questions, it does not cover the substantive scope of the heading. More

[11] General Headnote 20, HTSUS.

pertinent to the issues here, the government ignores General Headnote 10, which immediately precedes the provision upon which they seek to rely.

General Headnote 10(c), TSUS, directs that "an imported article ... is classifiable in the provision which most specifically describes it." If, for whatever reason, one cannot decide which provision provides the "most specific description," General Headnote 10(d) does not direct the court to defer to the "reasonable" views of the agency, but rather to classify the goods under the provision with the highest rate.[12] If the duty rates are equal, again there is no deference to the agency position, rather the statute directs classification in the provision "which first appears in the schedules." General Rule of Interpretation 3 of the HTSUS provides similar, although somewhat different rules which direct classification first under the provision which provides "the most specific description", if that cannot be decided then one looks to "essential character" of the article, and if the answer is still not clear one classifies the goods under the provision "which occurs last in numerical order." In short, the tariff schedules do not contemplate a range of permissible choices. Whenever the decision cannot be clearly made, classification is based upon the relative positions of the competing provisions in the tariff schedules and is not based upon deference to the views of the agency.[13]

[12] The government may be defending a provision with a lower duty because of quota or other implications, or may be defending a protest by an American manufacturer. 19 U.S.C. 1516.

[13] These provisions do not appear to provide the Customs Service the latitude to make "wise policy" choices (Chevron, 467 U.S._____ at 864) on the proper classification of imported merchandise. Indeed, when these provisions were enacted, Customs was statutorily precluded in many instances from exercising such policy judgments. 19 U.S.C. 1502(b) (1992). Moreover, when the current HTSUS was adopted in 1988, Congress explicitly granted policy making responsibility to the

The above discussion is not meant to be an exhaustive analysis of all of the potential issues involved in the question of the appropriate level of deference to be accorded a regulation in a tariff classification dispute. It does reflect, however, that such a decision requires a careful consideration of both the substantive and court review provisions which Congress has enacted to govern these questions. Nearly 50 years ago Justice Frankfurter noted the desirability of an issue being "further illumined by the lower courts," and observed that "Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). That is not the situation here. For nearly 20 years the government was not only content with the standard of review applied by the courts below, but defended it under the statutory language it helped to draft and supported. *See: Statement of David M. Cohen, Director Commercial Litigation Branch, Department of Justice, Hearings before the Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary, on the Customs Courts Act of 1980, at 52-53.* Inexplicably, the government has shifted course and sought "controlling weight" deference for every decision of the Customs Service, regardless of its pedigree. It has done so without any meaningful attempt to relate its new position to the detailed statutory provisions at issue or the historical context which lead to their passage. Resolution of the conflicting *dicta* on the government's new position should be left "to an appeal where the issue must be decided, based upon factors and a record that permit resolution of the real controversy. *See* Note 8, *supra* at 22.

United States Trade Representative and not to the Customs Service. 19 U.S.C. 1309, 1310.

CONCLUSION

The decisions below were based upon the application of a balancing test long applied by the relevant courts and the administrative agency, and a finding that the additional condition which the government sought to impose was contrary to the plain language of the statute. It is for this judgment that review is sought and petitioner has failed to provide a rationale basis for that request. The government does not dispute the applicability of the test, quite the contrary, it has argued that the plain meaning of the statute requires that approach be applied to the examples found in the statute and the regulations. Nor has the government presented any argument to refute the finding that the additional condition it sought to impose was contrary to the express language and intent of Congress.

There is even less justification to review the *dicta* on deference to a regulation. The government points to no other holding or *dicta* concerning the application of a regulation with which it is dissatisfied, and argues the comment in question is contrary to other panel decisions. Sound judicial administration requires that these issues be decided in cases where the issues are material and have been fully briefed.

Haggar should not be put to the burden of further litigation on an irrelevant issue.

Respectfully submitted.

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APPENDIX

APPENDIX

TITLE 28

§ 2638. New grounds in support of a civil action

In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground –

(1) applies to the same merchandise that was the subject of the protest; and

(2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

§ 2639. Burden of proof; evidence of value

(a)(1) Except as provided in paragraph (2) of this subsection, in any civil action commenced in the Court of International Trade under section 515, 516, or 516A of the Tariff Act of 1930, the decision of the Secretary of the Treasury, the administering authority, or the International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.

§ 2640. Scope and standard of review

(a) The Court of International Trade shall make its determinations upon the basis of the record made before the court in the following categories of civil actions:

(1) Civil actions contesting the denial of a protest under section 515 of the Tariff Act of 1930.

(2) Civil actions commenced under section 516 of the Tariff Act of 1930.

§ 2642. Analysis of imported merchandise

The Court of International Trade may order an analysis of imported merchandise and reports thereon by laboratories or agencies of the United States.

GENERAL HEADNOTE 10 OF THE TARIFF SCHEDULE OF THE UNITED STATES
19 U.S.C. 1202

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

(ii) comparisons are to be made only between provisions of coordinate or equal status, i.e., between the primary or main superior headings of the schedules or between coordinate inferior headings which are subordinate to the same superior heading;

(d) if two or more tariff descriptions are equally applicable to an article, such article shall be subject to duty under the description for which the original statutory rate is highest, and, should the highest original statutory rate be applicable to two or more of such descriptions, the article shall be subject to duty under that one of such descriptions which first appears in the schedules;

19 CFR 10.16

(b) ***Operations incidental to the assembly process.*** Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:

(1) Cleaning;

(2) Removal of rust, grease, paint, or other preservative coating;

(3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;

(4) Trimming, filing, or cutting off of small amounts of excess materials;

(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;

(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips; and

(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

HQ 556836

December 8, 1992

CLA-2 CO:R:C:S 556836 RAH

CATEGORY: Classification

TARIFF NO.: 9802.00.80(EN)

Ms. Sandra L. Haupt
CJ Tower, Inc.
128 Dearborn Street
Buffalo, New York 14207-3198

RE: Applicability of subheading 9802.00.80(EN), HTSUS, to U.S.-manufactured cells exported to Canada where they are charged and assembled into batteries

Dear Ms. Laupt:

This is in response to your letter of July 13, 1992, on behalf of GNB Batteries (Canada) Inc., and a "FAX" from Mr. Larry Clark dated October 29, 1992, requesting a ruling regarding certain lift truck batteries.

FACTS:

GNB Batteries, Inc. intends to import U.S.-manufactured cells into Canada on a temporary importation basis. In Canada, the cells are charged and assembled into lift truck batteries. The articles are then exported back to the United States.

The primary use of the article in the United States is to power electric fork lift trucks mainly for traction and lifting power.

The article is described as an Industrial Lead Acid Battery. It has been previously entered under subheading 8507.20.0000(EN), Harmonized Tariff Schedule of the United States (HTSUS), dutiable under the Canadian Free Trade Agreement, at the rate of 3.1 percent.

In his "FAX", Mr. Clark describes the assembly operation. The six cells are securely inserted into a steel tray. Each cell is connected to another by an intercell connector. A cable is drawn from the negative cell combination and a second cable from the positive cell combination. The two separate cables are then joined at the ends to a charging plug. Plastic shrouds are attached to the top of the intercell and terminal connectors to prevent shorting. The battery is then placed on a shipping skid. All the parts are of U.S. origin except tubing, intercell and terminal connectors and shipping skid and decal.

Charging the cells, which is done before the assembly operation, entails adding water and acid to the cells. They are then hooked up to charging panels and charged from 88 to 96 hours. The cells are fully charged at this point and ready to be put into the steel trays.

Mr. Clark states that the Canadian labor accounts for approximately 5 percent of the total battery value.

ISSUE:

Whether the assembly of the U.S.-manufactured cells into an industrial lead acid battery qualifies for the partial duty exemption available under subheading 9802.00.80(EN), Harmonized Tariff Schedule of the United States (HTSUS), when returned to the United States.

LAW AND ANALYSIS:

All articles imported into the U.S. are subject to duty unless specifically exempted therefrom under the HTSUS.

Subheading 9802.00.80(EN), HTSUS, provides a partial duty exemption for:

[a]rticles assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process, such as cleaning, lubricating and painting.

All three requirements of subheading 9802.00.80(EN), HTSUS, must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full appraised value of the imported assembled article, less the cost or value of the U.S. components assembled therein, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14(a), Customs Regulations (19 CFR 10.14(a)), states in part that:

[t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, lamination, sewing, or the use of fasteners.

The operations performed in the instant case (fastening and force fitting parts together) constitute acceptable assembly operations as delineated in 19 CFR 10.16(a). Moreover, we find that charging the U.S.-origin cells is a relatively minor operation requiring nominal labor which entails adding water and acid to the cells and hooking them up to charging panels. We understand in this regard that the cost of the charging operation represents less than .5 percent of the cost of the cells. Therefore, we conclude that assembly of the U.S.-manufactured cells into an industrial lead acid battery is an acceptable assembly operation under subheading 9802.00.80(EN), HTSUS, and that charging the cell before such assembly is incidental thereto.

HOLDING:

On the basis of the information presented, it is our opinion that the operations performed abroad to create the battery are considered proper assembly operations or operations incidental thereto. Therefore, the batteries may enter under subheading 9802.00.80(EN), HTSUS, with allowances in duty for the cost or value of the U.S.-origin components incorporated therein, upon compliance with the documentary requirements of 19 CFR 10.24. No allowance may be granted for the cost or value of the foreign- origin components, the water or the acid.

Sincerely,
John Durant, Director
Commercial Operations Division

HQ 556362
February 16, 1993

CLA-2 CO:R:C:S 556362 WAW

CATEGORY: Classification

TARIFF NO.: 9802.00.80(EN)

District Director
U.S. Customs Service
International & Terrace Sts
Nogales, Arizona 85621

RE: Application for Further Review of Protest No. 2604-91-100030; multiple outlet strips; painting; 9802.00.80(EN); incidental to assembly

Dear Sir:

This is in response to the above-referenced protest which was forwarded to our office concerning the applicability of the partial duty exemption under subheading 9802.00.80(EN), Harmonized Tariff Schedule of the United States Annotated (HTSUSA), to multiple outlet strips from Mexico.

FACTS:

S.L. Waber imports multiple outlet strips from Mexico, which consist of a can, a back, and various other subassemblies (i.e., circuit breakers, wires, switches, etc.). Your office denied the partial duty exemption under subheading 9802.00.80(EN), HTSUSA, because the cans and backs were painted in Mexico. Protestant maintains that the

subject entries should be entitled to the partial duty exemption under subheading 9802.00.80(EN), HTSUSA.

Protestant sends unpainted cans and backs suitable for use in the production of the multiple outlet strips to Mexico where they are painted and then assembled with various other subassemblies into the finished article. The cans and backs used on the multiple outlet strips are received in bulk from protestant's suppliers. These parts are bulk released to protestant's paint department. The paint department unloads the cans or backs onto a chain conveyor that carries them through a spray wash and dry system to remove the die oils used by the U.S. suppliers to manufacture the parts in their punch presses and dies. The parts are then loaded onto tree racks (five backs or five cans per rack), on a progressive paint conveyor. The first stage of the conveyor is a final dry stage. The second stage is the paint booth where the rack spins and all five parts pass in front of an electrostatic spray gun and are painted with one coat of paint. Protestant states that the outside of the cans receive more paint than the inside due to the hanging method and tree rack design. During the third stage of production, the conveyor carries the parts into a propane fired drying oven for final paint drying. The conveyor exits the oven to stage four where the parts are unloaded onto pallets. The conveyor continues forward to the loading stage. The cans and backs are stored and issued to final assembly along with all other raw materials necessary to build the final product. After the cans and backs are painted the subassemblies are prepared and the components are loaded onto the can. The cans and backs may be painted a variety of colors, depending upon customer specification. Finally, the finished multiple outlet strip is tested and labeled, before it is packaged for shipment to the U.S. Protestant states that approximately 22 components are assembled manually by means of both soldering and screwing operations.

The time and costs necessary for washing and painting a set (can/back) of parts is as follows:

Item	Cost	Paint Labor	Paint Overhead	Total
Can	$.485/ea	$.00744/ea	$.04464/ea	$.53708
Back	.115/ea	.00558/ea	.03348/ea	.15406
Paint	.086/set	0	0 .086	
	$.686/set	$.01302/set	$.07812/set	$.77714/set

The total assembly value of a multiple outlet strip is calculated to be $5.42028/unit.

ISSUE:

Whether the multiple outlet strip from Mexico is entitled to the partial duty exemption available under subheading 9802.00.80(EN), HTSUSA, when returned to the U.S.

LAW AND ANALYSIS:

Subheading 9802.00.80(EN), HTSUSA, provides a partial duty exemption for:

> [a]rticles assembled abroad in whole or in part of fabricated
> components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubrication, and painting. . .

All three requirements of subheading 9802.00.80(EN), HTSUSA, must be satisfied before a component may receive a duty allowance. An article entered under this tariff provision is subject to duty upon the full value of the imported assembled article, less the cost or value of such U.S. components, upon compliance with the documentary requirements of section 10.24, Customs Regulations (19 CFR 10.24).

Section 10.14(a), Customs Regulations (19 CFR 10.14(a)), states in part that:

[t]he components must be in condition ready for assembly without further fabrication at the time of their exportation from the United States to qualify for the exemption. Components will not lose their entitlement to the exemption by being subjected to operations incidental to the assembly either before, during, or after their assembly with other components.

Section 10.16(a), Customs Regulations (19 CFR 10.16(a)), provides that the assembly operation performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners.

Operations incidental to the assembly process are not considered further fabrication operations, as they are of a minor nature and cannot always be provided for in advance of the assembly operations. However, any significant process, operations or treatment whose primary purpose is the fabrication, completion, physical or chemical improvement of a component precludes the application of the exemption under subheading 9802.00.80(EN), HTSUSA, to that component. See 19 CFR 10.16(c).

We have previously held that dipping an article into waterbase paint for rust protection purposes is considered an acceptable incidental operation pursuant to 19 CFR 10.16(b)(3), which states that the application of preservative paint or coating is an incidental operation. See Headquarters Ruling Letter (HRL) 555569 (19 CFR 10.16(b)(3)). In the instant case, protestant states that the primary purpose of applying paint to the cans and backs of the multiple outlet strip is to protect these components from rust over the years. Moreover, based on the information provided in your submission regarding the cost and time of the painting operation, it appears that the operation is minor in comparison to the total assembly of the multiple outlet strips. Therefore, we are of the opinion that the painting operation is considered an operation incidental to the assembly process pursuant to 19 CFR 10.16(b)(3).

HOLDING:

Based on the information presented, it is our opinion that the operations performed abroad to create the multiple outlet strips are considered proper assembly operations or operations incidental to the assembly process. Therefore, the imported multiple outlet strips may be entered under subheading 9802.00.80(EN), HTSUSA, with allowances in duty for the cost or value of the U.S. components incorporated therein, upon compliance with the documentary requirements of 19 CFR 10.24.

This protest is hereby granted in full. A copy of this decision should be attached to the Customs Form 19 and mailed to the protestant as part of the notice of action on the protest.

Sincerely,
John Durant, Director
Commercial Rulings Division